No. 92-515

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

STATE OF WISCONSIN,

Petitioner,

- against -

TODD MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE CITIES OF ATLANTA, BALTIMORE, BOSTON, CHICAGO, CLEVELAND, LOS ANGELES, NEW YORK, PHILADELPHIA, AND SAN FRANCISCO, AS AMICI CURIAE IN SUPPORT OF PETITIONER

O. PETER SHERWOOD,
Corporation Counsel for the City of New York,
100 Church Street,
New York, N.Y. 10007
(212) 788-1010

BURT NEUBORNE and
NORMAN DORSEN
Of Counsel to the City of New York,
40 Washington Square So.
New York, N.Y. 10012
(212) 998-6172

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
RONALD P. YOUNKINS,
PAMELA SEIDER DOLGOW,
LINDA H. YOUNG,
of Counsel.
* Counsel of Record

Other Counsel are listed on inside cover.

MICHAEL V. COLEMAN
City Attorney
68 Mitchell Street, S.W.
Suite 4100
Atlanta, GA 30335
(404) 330-6400

NEAL M. JANEY
City Solicitor
Department of
Law
City Hall, Suite 101
100 Holiday Street
Baltimore, MD 21202
(410) 396-3100

ALBERT W. WALLIS
Corporation Counsel
of the City of
Boston
City Hall
Boston, MA 02201
(617) 635-4609

KELLY R. WELSH
Corporation Counsel
of the City of
Chicago
LAWRENCE ROSENTHAL
Deputy Corporation
Counsel
BENNA RUTH SOLOMON
Chief Assistant
Corporation Counsel
30 N. La Salle Street
Suite 800
Chicago, IL 60602
(312) 744-7764

DANNY R. WILLIAMS
Director of Law
601 Lakeside Avenue
Room 106-City Hall
Cleveland, OH 44114
(216) 664-2800
SHARON S. JORDAN
Chief Counsel
RICHARD F. HORVATH

JAMES K. HAHN
City Attorney
JULIE P. DOWNEY
Ass't City Attorney
JESSICA F. HEINZ,
Deputy City Attorney
1800 City Hall East
200 North Main St.
Los Angeles, CA 90012
(213) 485-4288

JUDITH E. HARRIS
City Solicitor
MICHAEL F. EICHERT
Divisional Deputy, Appeals
City of Philadelphia
Law Department
Eighth Floor, 1600 Arch St.
Philadelphia, PA 19103
(215) 686-5247

LOUISE H. RENNE
City Attorney
City Hall, # 206
San Francisco, CA 94102
(415) 554-4216
DENNIS AFTERGUT,
of Counsel

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INTEREST OF THE AMICI CURIAE

The 1990 census figures for New York City, with its population of 7,322,564, reflect remarkable racial diversity:

43% white nonhispanic, 25% black nonhispanic, 24% Hispanic, and 7% Asian. See N.Y.C. Department of City Planning, Population Division, February 27, 1991, Table 3. In the City of Philadelphia, the 1990 census data show a population which is 52% white nonhispanic, 39% black nonhispanic, 6% Hispanic, and 3% Asian. According to the 1990 Census of Population and Housing published by the Northern Ohio Data and Information Service, Cleveland's population of 505,616 is 48% white nonhispanic, 46% black nonhispanic, and 4% Hispanic. Raw census figures, however, do not do justice to the kaleidoscopic array of nationalities, language groups, lifestyles, backgrounds and beliefs that make up the mosaic of our nations' cities. In a world in which toleration and mutual respect appear at times to be endangered, the fact that the vast majority of Americans of every race, color and creed live together in peace is a sign of hope. Tragically, hate crimes, which inflict unique harm on the victim, the minority community, and society at large, threaten that hope.

Confronted by the challenge to a tolerant society posed by hate crime, New York City began as early as 1980 to address hate crime through the formation of a Bias Incident Investigation Unit in its Police Department. New York City's Human Rights Commission maintains a community relations staff that strenuously endeavors to deal with tensions before they erupt into bias crimes. Responding to similar concerns, the City of Philadelphia Police Department's Conflict Prevention and Resolution Unit, which was created in 1986, investigated 276 allegations of ethnic intimidation in 1992, and 239 such allegations the year before. In each of these years, over 55% of those alleged incidents were deemed to have been well founded. After Ohio's Ethnic Intimidation Law became effective in

1986, the Cleveland Police Department charged its Repeat Offender Program Enforcement Unit ("ROPE") with the responsibility of investigating ethnic intimidation and racially-motivated incidents. This ROPE Unit reported 123 such incidents in 1992. A long-established Community Relations Board in Cleveland has created a number of programs in an effort to promote understanding among the racially and culturally diverse groups within the community. These efforts and similar ones in other cities would be imperiled if legislation did not exist enhancing the criminal penalties associated with such crimes. Enhanced penalties for hate crimes provide increased deterrence and powerful denunciation - critical weapons in the fight against bias-induced violence.

It is our cities that are most threatened by hate crime. Their greatest strength - their astonishing diversity - also makes them most vulnerable to bias crimes. Because our cities have such a major stake in reducing and eliminating bias crime, and because bias crime legislation is the most effective means to redress this problem, it is with a particular urgency, as explained in greater detail below, that Amici urge this Court to reverse the decision of the Supreme Court of Wisconsin.

STATEMENT OF THE CASE AND INTRODUCTION

"The intense fear, anger and utter isolation that must be felt by victims of 'hate crimes' derive from decades, if not centuries, of oppression, [and] discrimination ...." Victoria L. Handler, Legislating Social Tolerance: Hate Crimes and the First Amendment, 13 Hamline J. Pub. L. & Pol'y 137 (1992). Even for those who do not, or cannot, fully understand the depth of anguish produced in the victim,

accounts of bias crimes are horrifying. In this case, a white victim was beaten unconscious because the defendants wanted to "fuck up" a white as revenge for the anti-black racism graphically - and accurately - portrayed in the movie Mississippi Burning. State v. Mitchell, 485 N.W.2d 807, 809 (Wis. 1992), cert. granted, 61 U.S.L.W. 3435 (U.S. Dec. 14, 1992) (No. 92-515).

In Tampa, Florida, three white men abducted a black tourist, robbed him, doused him with gasoline, and burned him on New Year's Day, 1993. Investigatqrs found a note signed "KKK," which read "One less nigger and one more to go." 3 Whites Indicted in Burning of a Black, N.Y. Times, Jan. 8, 1993, at A13.

Just a year ago in the Bronx, a fourteen-year-old black adolescent and his twelve-year-old sister were beaten, robbed, and smeared with white shoe polish by four white teenagers while being told it was "their day to be white." N.Y. Times, January 28, 1992, at B1.

In a case recently heard by the City of New York's Criminal Court under New York Penal Law § 240.30(3) (McKinney 1989),[1] in which the court upheld the constitutionality of New York's bias crime law, three defendants approached two victims. One of the defendants stated, "We don't want any Spics or Niggers in the

[1] Penal Law § 240.30(3) makes it a crime of aggravated assault in the second degree: "when with intent to harass, annoy, threaten or alarm another person, [a person] strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion or national origin of such person."

neighborhood," and then punched and kicked them. People v. Miccio, 589 N.Y.S.2d 762 (N.Y.C. Crim. Ct. 1992).[2]

In another case heard by the City of New York's Criminal Court, similarly finding no First Amendment problem with New York's bias-crime law, the defendant struck the victim about his face and body, causing substantial pain in his chest and numbness to his face. This assault was carried out while the criminal defendant shouted ethnic slurs at the victim, including "Is that the best you can do? I'll show you Jew. bastard." People v. Grupe, 532 N.Y.S.2d 815, 817 (N.Y.C. Crim. Ct. 1988).[3]

In an effort to address the nationwide problem of hate crimes, Congress recently passed the Hate Crime Statistics Act of 1990, Pub. L. No. 101-275, 104 Stat. 140 (1990). The Federal Bureau of Investigation's survey of bias crimes in 1991, even with 18 states not yet participating, tallied

[2] The Miccio court upheld the New York statute prohibiting criminal harassment. The court held that the behavior proscribed by this statute does not involve bias-related fighting words, but rather the defendants' physical actions. Just as the New York Legislature has differentiated the seriousness of other criminal behavior based on the mens rea of the defendant, the court held that the Legislature here properly made the crime of harassment more serious if it is motivated by bias.

[3] Similarly, the Grupe court held that New York Penal Law § 240.30(3) regulates not bigotry, but violent conduct or the threat of violent conduct. Even giving the criminal defendant's arguments "the greatest conceivable latitude" by assuming that defendant's actions contained a sufficient communicative element to create a First Amendment issue, the Grupe court held that the statute satisfied the standard set forth in United States v. O'Brien, 391 U.S. 367 (1968).

4,755 crimes nationwide based on race, religion, or sexual orientation. New York Post, Jan. 5, 1993, at 4. These devastating crimes are indisputably on the rise.[4] See, e.g., Note, Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence," 99 Yale L.J. 845, 845-46 (1990).

The New Jersey Attorney General's office attributes the increase "to difficult economic times" as well as a growing awareness of the state's bias crime reporting system. New Moves Planned on Bias Crimes, N.Y. Times, July 12, 1992, sec. 13, New Jersey Weekly Desk. According to an FBI spokesperson, New York State's high tally of 943 hate crimes in 1991, out of the nationwide total of 4,755, was not a sign that hate crimes occur more in New York State and City than other places. The FBI spokesperson attributed the state's high tally to the fact that New York is "more sensitive to the issue than other states, and New York City, in particular, does a better job of tallying such crimes." New York Post, Jan. 5, 1993, at 4, col. 1. Even if some of the increase in national and local hate crime statistics may be attributed to greater recognition of the problem and better reporting, the figures nationwide

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[4] While the New York City Criminal Court in 1988 noted that the New York City Police Department reported 463 bias crimes in 1987, People v. Grupe, 532 N.Y.S.2d at 819, the New York City Police Department Bias Incident Investigating Unit reported 500 bias cases in 1991 and, for only eleven months of 1992, the statistics have already reached 604. For the five-year period between 1986 and 1991, Chicago reports a total of 1371 hate crimes. When Worlds Collide: Cultural Conflict and Reported Hated Crimes in Chicago, A Report to the Chicago Commission on Human Relations by Metro Chicago Information Center, June 9, 1992.

nonetheless demonstrate an alarming trend. D. Goleman, As Bias Crimes Seem to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990, at C1.

As demonstrated by the experience of New York City's Bias Incident Investigation Unit, hate crimes are by no means limited to racial incidents. In 1989, the Anti-Defamation League of B'nai B'rith ("ADL") recorded the highest number of incidents of anti-Semitic vandalism, desecration, and harassment since the ADL began counting a decade earlier in 1979. Bringing Hate Crime Into Focus, 26 Harv. C.R.-C.L. L. Rev. 261 (1991). Unfortunately, the 1989 figures have been surpassed by 1991 figures. The ADL reports the even higher total of 1,879 incidents of anti-Semitic vandalism, violence, and harassment in 1991, as reported from forty-two states and the District of Columbia. Brief of Amici Curiae, The Anti-Defamation League, et al., in Support of Petitions for Writ of Certiorari at 6. Similarly, the Department of Justice reported a national increase of sixty-two percent in hate crimes perpetrated against Asians. Brief of the National Asian Pacific American Legal Consortium, et al., as Amici Curiae in Support of the Petition for a Writ of Certiorari at 7.

"[A]ccording to a recent study commissioned by the National Institute of Justice, gay men and lesbians are probably victimized more often than any other minority group." Note, Developments in the Law - Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1541 (1989). In fact, a 1984 study by the National Gay and Lesbian Task Force revealed that twenty percent of gay men and ten percent of lesbians report being physically assaulted because of their sexual orientation. Id. In 1989 alone, this

task force reported 7,031 incidents of anti-gay violence nationwide.

Moreover, statistics measuring bias crimes may well understate the extent of such crimes. According to Howard Ehrlich, director of research at the National Institute Against Prejudice and Violence, perhaps 80 percent of bias incidents are not reported, chiefly because victims feel nothing will be done. M.R. Kleinfield, Bias Crimes Hold Steady, But Leave Many Scars, N.Y. Times, Jan. 27, 1992, at A1. For instance, although the New York City Police Department recorded only 88 anti-gay crimes in 1991, 592 such crimes were reported to the Gay and Lesbian Anti-Violence Project in the same time period. Dennis Hevesi, Group Finds a 65% Rise in Bias Crime, N.Y. Times, Feb. 27, 1992, at B4.

Whether based on race, color, religion, national origin, or sexual orientation, bias crimes tear at the very fabric of a democratic, pluralistic society.

> Acts of bias-related violence are directed not at individuals solely, but at the group of which the victim is perceived to be a member. Because of this, both the victim and the community are depersonalized, isolated, violated and robbed of the sense of security required if one is to live, work, play, pray, or interact in any sustained or substantive manner in a society composed of diverse groups.

State of New York, Governor's Task Force on Bias-Related Violence, March 1988 at 1. These crimes produce devastating effects. Victims of bias crimes suffer 21% more

psychological and physiological symptoms than victims of non-bias related crimes. National Institute Against Prejudice and Violence, National Victimization Survey, 1989. Victims recount that bias crimes leave a residue of painful distrust and fitful dreams. M.R. Kleinfield, Bias Crimes Hold Steady, But Leave Many Scars, N.Y. Times, Jan. 27, 1992, at A1. Because hate crimes are frequently vicious, their victims are hospitalized four times more often than victims of other assaults. D. Goleman, As Bias Crimes Seem to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990, at C1.

The State of New York, Governor's Task Force on Bias-Related Violence heard testimony from victims of bias crimes, which paralleled the findings of a study of bias victims conducted by the National Institute Against Prejudice & Violence.

> The intensity of feeling and range of negative reactions was striking. Recent immigrants were disillusioned about America. Many individuals and families became isolated, withdrawn and paranoid out of fear. Others were overcome by anger and revenge fantasies. Some fought ceaselessly to stymie feelings of hatred for their attackers. Sadness and powerlessness characterized others.

Governor's Task Force Report at 5, citing National Institute Against Prejudice & Violence, The Ethnoviolence Project, Institute Report No. 1 (1986).

Bias crimes also have a devastating impact on communities. Such crimes "generate widespread fear and

intimidation within and between communities, affecting many more individuals than the victim and his immediate acquaintances." Note, Combatting Racial Violence: A Legislative Proposal, 101 Harv. L. Rev. 1270, 1280 (1988) (hereinafter "Combatting Racial Violence"). "A bias crime is like no other crime . . . . A normal crime affects the victim, perhaps his family and friends. But a bias crime goes beyond and can affect the whole community, the whole city." Crimes of Prejudice: a Matter of Motive, N.Y. Times, Nov. 1, 1987, at E6, col. 3 (quoting Michael Markman, Commander of New York City Police Department Bias Incident Investigating Unit).

A further effect on communities is the tendency of bias crimes to incite further violence. Combatting Racial Violence, 101 Harv. L. Rev. at 1280-81. For example, following the beating in the Bronx of two minority youths on January 6, 1992, the Bronx experienced more bias crimes in January than in the previous four months combined according to the New York City Police Department Bias Incident Investigating Unit Incident Report 1992. In New York City, nine bias-related incidents occurred over the weekend after the stabbing death of an Hispanic student. N.Y. Times, March 16, 1992, at B3. After racial disturbances in the Crown Heights section of Brooklyn following a car accident in August 1991 in which a Jewish driver struck and killed a black child, reports of bias incidents rapidly increased that month. Lynda Richardson, 61 Acts of Bias: One Fuse Lights Many Different Explosions, N.Y. Times, Jan. 28, 1992, at B1, col. 2. Similar surges followed the 1990 dispute between a Korean grocer and a black customer in Flatbush, Brooklyn; in 1989, following the shooting of Yusuf Hawkins, a black teen-ager in Bensonhurst, Brooklyn; and in 1986, following the killing

of Michael Griffith, a young black man chased into highway traffic in Howard Beach, Queens. Id.

A disturbing characteristic of these crimes is the high incidence of juvenile offenders, a characteristic which underscores the need to send a message that bias crimes are reprehensible. Most of the perpetrators of bias crimes are in their teens or twenties. D. Goleman, As Bias Crimes Seem to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990, at C1. In New York City, in the three-year period from January 1, 1987 to December 31, 1990, the Bias Incident Investigation Unit investigated 2,084 confirmed bias incidents. A total of 1,076 arrests were made; 687, or 63.8%, of the persons arrested were under the age of 20. N.Y.C. Police Department Bias Incident Investigation Unit Report at 1. In Chicago, of the 288 hate crimes reported in 1992, at least 57 cases involved juveniles as victims or offenders. In one case the offender was nine years old. Bias Crime Report 1992, Chicago Commission on Human Relations (forthcoming). A pressing need thus exists for society, through its legislatures, to send a message to our young, as well as others, that bias crime cannot be tolerated.

As Governor Cuomo stated in an August 15, 1991 open letter to members of the New York State Legislature in seeking support for New York's Bias Related Violence and Intimidation Act, "[a]s government, our single most effective weapon is the law. I implore you to ... make it clear to the people of this state that behavior based on bias will not be ignored or tolerated." Because of the deterrent effect and essential message of such legislation, and, more significantly, because such legislation does not violate the First Amendment, as is set forth in the Argument below,

Amici urge this Court to reverse the decision of the Supreme Court of Wisconsin.

ARGUMENT

WISCONSIN'S DECISION TO IMPOSE ENHANCED CRIMINAL PENALTIES ON DEFENDANTS WHO VIOLENTLY ASSAULT VICTIMS BECAUSE OF THEIR RACE DOES NOT VIOLATE THE FIRST AMENDMENT.

Wisconsin is one of forty-four[5] states to single out bias-motivated crimes[6] for enhanced sentencing or separate status, reflecting a widely-shared legislative judgment that bias-motivated crimes pose a unique threat to a tolerant society.[7]

This Court has explicitly upheld consideration of bias motivation by a sentencing judge in a capital case, as long as the principles of relevance and freedom of association are respected. Dawson v. Delaware, 112 S. Ct. 1093 (1992); Barclay v. Florida, 463 U.S. 939 (1983). While Wisconsin imposes its enhanced sentence pursuant to statute rather than judicial sentencing discretion, no basis exists to distinguish between a judge and the legislature in this regard. If anything, a uniform legislative judgment enhancing sentence for bias-motivated crimes is preferable to ad hoc exercises of judicial discretion. Even more importantly, when the enhancement is created by statute, the issue of causation by culpable mental state becomes an element of the offense, vesting the accused with crucial procedural protections that are often absent from the sentencing process. See In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975).

In identifying race-based animus as an important factor in assessing the legal consequences of criminal conduct,[8] Wisconsin follows a well-trodden path in

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[5] According to the Anti-Defamation League, 32 states have enacted legislation similar to Wisconsin's enhancing the penalties for bias-motivated crime, and 12 states have enacted legislation singling out bias-motivated crime for special status. Hate Crimes Statutes: A 1991 Status Report (Report of the Anti-Defamation League).

[6] Wisconsin's statute enhances penalties for a wide range of criminal behavior when the defendant:

> "intentionally selects the person against whom the crime is committed...because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person...". Wis. Stat. §939.645.

[7] The wisdom of such a legislative judgment is, of course, not a question for this Court. For a critical view of the wisdom and efficacy of so-called hate crimes legislation, see James B. Jacobs, The Emergence and Implications of American Hate Crimes Jurisprudence, 22 Israel Yearbook on Human Rights 39 (1992).

[8] While amici believe that the Wisconsin statute is constitutional in all its potential applications, this case involves only the constitutionality of the statute as applied to a violent assault unquestionably motivated by the victim's race.

American law. Congress, the states and virtually every level of local government have enacted civil and criminal statutes punishing behavior motivated by discriminatory animus.[9]

Nonetheless, a majority of the Supreme Court of Wisconsin ruled that augmenting a sentence for a bias-motivated assault punishes a defendant, not for his acts, but for his evil thoughts and hateful words in violation of the First Amendment.[10]

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[9] See, e.g., 18 U.S.C. §§ 241; 242 and 245. United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990), cert. denied, 112 S. Ct. 353 (1991); United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986). See also 42 U.S.C. § 1985(3); Griffin v. Breckenridge, 403 U.S. 88 (1971). Other examples of statutes singling out bias-based motivation as a key to liability are Title VII, prohibiting discrimination in employment and Title VIII forbidding discrimination in the sale or rental of housing. Compare United Steelworkers v. Weber, 443 U.S. 193 (1979) (no liability for good faith affirmative action plan) with Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (liability for stereotypical promotion criteria). This Court has even held that disparate harm alone is not sufficient to establish a violation of the Fourteenth Amendment or the Voting Rights Act in the absence of proof of a culpable mental state. Compare Washington v. Davis, 426 U.S. 229 (1976) and City of Mobile v. Bolden, 446 U.S. 55 (1980) with Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[10] State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), reversing 473 N.W.2d 1 (Wis. Ct. App. 1991).

The Supreme Court of Oregon upheld a similar statute in State v. Plowman, 838 P.2d 558 (Or. 1992), petition for cert. filed, 61 U.S.L.W. 2149 (U.S. Nov. 23, 1992) (No. 92-6702). See also State v. Beebe, 680 P.2d 11 (Or. Ct. App. 1984). Lower courts in New York and Maryland have also upheld bias-enhancement provisions against constitutional attack. People v. Dinan, 461 N.Y.S.2d 724 (N.Y.C. Ct. 1983); People v. Grupe, 532 N.Y.S.2d 815 (N.Y.C. Crim. Ct. 1988); People v. Miccio, 589 N.Y.S. 2d 762 (N.Y.C. Crim. Ct. 1992); Kinser (continued...)

The Wisconsin Court was, of course, correct in asserting that the First Amendment forbids "thought crimes." Mere thought, even when it is outwardly manifested as speech and association, can never give rise to criminal liability -- unless it ripens into unlawful action. Dawson v. Delaware, 112 S. Ct. 1093; Fiske v. Kansas, 274 U.S. 380 (1927). As the Chief Justice noted in Dawson, "abstract beliefs" that do not ripen into unlawful action cannot be punished. 112 S. Ct. at 1098.

But where, as here, serious criminal activity has concededly occurred, the First Amendment does not prevent the state from seeking to isolate the defendant's racial bias as the operative cause of the criminal activity in order to deter, punish, and denounce it.

Amici believe that the well-intentioned refusal of the court below to permit Wisconsin to enhance sentences in bias-motivated crimes was premised on three serious misconceptions.

First, the majority incorrectly treated a criminal defendant's biased mental state and his criminal act as wholly separate and independent concepts. In fact, under the Wisconsin statute, the defendant's bias must be shown to be the cause of his criminal act, thus inextricably linking the two as integral components of a crime.

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[10] (...continued)
v. State, 591 A.2d 894 (Md. App. 1991). Courts in Michigan and Ohio have ruled them invalid. State v. Wyant, 597 N.E.2d 450 (Ohio 1992), petition for cert. filed, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-568); People v. Justice, No. 1-90-1793 (14th Mich. Jud. Dist. Ct., December 18, 1990).

Second, the majority misapplied the central distinction between speech and action that underlies the First Amendment. Properly understood, the Wisconsin statute punishes action, not speech.

Finally, the majority confused a concern with the nature of the evidence admissible to prove that bias actually caused the crime with the legitimacy of considering bias motivation at all in assessing sentence.

A. The Wisconsin Supreme Court Incorrectly Viewed Defendant's Biased Mental State and His Criminal Act as Wholly Separate and Distinct Concepts. In Fact, Since Wisconsin Must Prove That Defendant's Racial Bias Caused the Unlawful Act, Bias is an Integral Component of the Crime.

The Wisconsin Supreme Court correctly noted that the defendant would not have been subjected to an enhanced sentence but-for his racial bigotry. Thus, the court reasoned, the enhanced punishment was really for defendant's evil thoughts and words, not his evil deeds. In effect, the court treated Wisconsin's statute as establishing two separate offenses - the crime of aggravated assault and the crime of racial bigotry.

If, in fact, the Wisconsin statute purported to make bigotry a crime, the statute would indeed violate the First Amendment. Dawson v. Delaware, 112 S. Ct. 1093. But Wisconsin's statute does not punish racial bigotry as such. Defendant's racial bigotry is relevant solely because it was

the operative cause of a serious crime. In order to invoke the enhanced penalty, the state must prove beyond a reasonable doubt that defendant harmed his victim because of his race. Mullaney v. Wilbur, 421 U.S. 684. Thus, defendant's racial animus and his criminal assault are not two independent crimes that happen to be linked by a single indictment. They are yoked together by a requirement that the state prove beyond a reasonable doubt that the assault was caused by the defendant's racial bias. Unless such a causal link can be proved beyond a reasonable doubt, defendant's views on race are irrelevant. On its own terms, therefore, the state court's treatment of the Wisconsin statute as creating a separate crime of bigotry is untenable. The Wisconsin Court overlooked the fact that but-for defendant's bigotry, he would not have incited the assault.

Moreover, the Wisconsin Court's insistence that the First Amendment requires Wisconsin to ignore a defendant's mental state in assessing blameworthiness is unprecedented. In fact, the seriousness of criminal behavior traditionally turns on two variables: the harm caused by the act and the culpability of the mental state of the actor.[11] See George Fletcher, Rethinking Criminal Law (1978); Hyman Gross, A Theory of Criminal Justice (1979).

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[11] The law of homicide is an example of seriousness varying with the defendant's mental state, even though the harm is identical whether or not the homicide was premeditated. See Patterson v. New York, 432 U.S. 197 (1977). The law of attempts is an example of seriousness varying with harm, even though the defendant's mental state is identical whether or not the attempt succeeds. E.g., Cal. Penal Code § 664 (West 1988); N.Y. Penal Law § 110.05 (McKinney 1987).

In this case: (1) but-for bias there would have been no criminal act; (2) bias-motivated crime causes independent harms both to the victim and to society; and (3) bias-motivated crime is a legitimate target for enhanced general and specific deterrence. Thus, the Wisconsin Court's refusal to permit mental state to be considered in imposing sentence is completely contrary to traditional practice. Barclay v. Florida, 463 U.S. 939 (permitting sentencing judge to consider biased motivation for homicide).

In an effort to distinguish the Wisconsin statute from the widespread consideration of mental state as a factor in determining the seriousness of criminal behavior, the Wisconsin court sought to erect a set of elaborate semantic distinctions between and among "intent," "purpose," and "motive." State v. Mitchell, 485 N.W.2d at 813, n.11. Linking sentence to "intent" and "purpose" is proper, argued the court; but linking sentence to "motive" impermissibly endangers the First Amendment. Id. Such an approach fails for at least two reasons. First, it is doubtful whether legal distinctions of constitutional consequence can be premised on purported distinctions between and among intent, purpose, and motive. See Jeffrie G. Murphy, Bias Crimes: What Do Haters Deserve?, Criminal Justice Ethics 20, 22 (1992). According to the court, each has a fixed, objective meaning. In fact, the three concepts blend into one another depending upon the level of generality at which each is addressed. For example, the court characterized the defendant's "intent" as the knowing infliction of force on the victim and the defendant's "motive" as the wish to harm white people. State v. Mitchell, 485 N.W.2d at 813 n.11. But the so-called categories can be manipulated by simply re-characterizing defendant's "intent" or "purpose" as the knowing infliction of harm on a white person. The

differences between and among intent, purpose, and motive, while helpful for purposes of academic analysis and policy debate, are too subject to semantic manipulation to bear the weight of constitutional consequence imposed on them by the Wisconsin court.

Second, even if it were possible to isolate motive from purpose and intent as an objective matter, no basis exists to immunize motive from legal scrutiny when it is causally linked to a serious crime. For example, the defenses of duress, justification, and self-defense recognize that "innocent" motives may cause a crime.[12] This case is the obverse of such exculpatory use of innocent motive. In this case, the motive that caused the crime is blameworthy, not innocent. The consequence is enhanced sentence, not exoneration.

B. The Wisconsin Supreme Court Misapplied the Central Distinction Between Speech and Action That Underlies First Amendment Protection.

The Wisconsin court was clearly correct in recognizing that thought, speech, and association are accorded uniquely protected status in our law. In the absence of an act causing harm, thought, speech and association are immune from criminal sanction, no matter how abhorrent the content. E.g., Texas v. Johnson, 491 U.S. 397, 414 (1989);

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[12] Of course, in these settings, motive is put into evidence by the defendant. The principle that motive, when inextricably linked to the act, need not be ignored remains operative in both instances.

Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

Moreover, we narrowly limit the nature of the harm that can be ascribed to speech and association. We do not, for example, recognize anger, offense, or even emotional distress as a cognizable harm justifying censorship. Hustler Magazine v. Falwell, 485 U.S. 46 (1988). Nor, in the absence of incitement, do we ascribe the anti-social acts of hearers to a speaker. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).[13]

Third, we require proof of an extraordinarily close causal nexus between First Amendment behavior and an alleged harm flowing from it before the First Amendment activity can be suppressed. New York Times Co. v. United States, 403 U.S. 713 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes and Brandeis, JJ, dissenting); Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis and Holmes, JJ, concurring).

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[13] This case is a classic example of the principle. Defendant committed aggravated assault after viewing Mississippi Burning, a searing indictment of white racism. Under a strict but-for test of causation, the movie "caused" the assault. In some societies, such a link would justify the imposition of civil and criminal sanctions on the speaker. We recognize that once an idea leaves a speaker's control, he cannot be held legally responsible for its use - or abuse - by third persons, both because it is fundamentally unfair to do so and because it would generate enormous self-censorship.

Finally, we impose rigorous procedural requirements of timing, fair notice, precise drafting, narrow tailoring, and equal treatment on any effort to regulate First Amendment behavior.[14]

Thus, no defendant can be punished simply because he is a bigot, no matter how offensive his thoughts, speech, or behavior. Nor can a defendant be punished because his bigotry or his speech, standing alone, is especially offensive to members of the victim group. Nor can a defendant be punished merely because his bigotry or his speech may lead to future harmful acts. Dawson v. Delaware, 112 S. Ct. 1093; Brandenburg v. Ohio, 395 U.S. 444; Hess v. Indiana, 414 U.S. 105 (1973).

But there is no immunity in our law for thought, speech, or association when they are integral components of unlawful acts. A criminal conspiracy is a classic exercise in association. Yet, if the requisite "act in furtherance" takes place, the very act of associating becomes an integral component of a crime. E.g., Bourjaily v. United States, 107 S. Ct. 2775 (1987). Similarly, the verbal message underlying blackmail, extortion, and intimidation is plainly speech. But the fear caused by such speech renders it an integral component of a criminal act. Kent Greenawalt, Speech, Crime and the Uses of Language, (1989); Kent Greenawalt, Criminal Coercion and Freedom of Speech, 78 Nw. L. Rev. 1081 (1984).

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[14] See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (unequal treatment); Smith v. Goguen, 415 U.S. 566 (1974)(vagueness); Broadrick v. Oklahoma, 413 U.S. 601 (1973)(overbreadth).

Even a defendant's mental process is not beyond the legitimate scope of the criminal law when it is an integral component of a criminal act. For example, the law of homicide assesses the blameworthiness of an act causing death only after considering the mental state of the defendant. E.g., Mullaney v. Wilbur, 421 U.S. 684; Patterson v. New York, 432 U.S. 197; Martin v. Ohio, 480 U.S. 228 (1987).[15]

Wisconsin's enhanced sentencing statute operates only when the defendant's bias is an integral part of an act causing criminal harm. Unlike settings where speech is protected from sanction because doubt exists concerning the causal nexus between the speech and harmful conduct, Wisconsin invoked its statute in this case only after it was proven beyond a reasonable doubt that defendant's racial bias was the operative cause of the crime.[16] Thus, under

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[15] Our criminal tradition even recognizes liability for attempting to commit an impossible act when no discernible harm is caused by the attempt. In the "impossible attempt" cases, criminal liability is predicated solely on the actor's guilty mental state and his demonstrated dangerousness. Steven J. Schulhofer, Attempt, 1 Encyclopedia of Crime and Justice 97 (Sanford H. Kadish ed. 1983). See Graham Hughes, One Further Footnote on Attempting the Impossible, 42 N.Y.U. L. Rev. 1005 (1967).

[16] The assault in this case was clearly motivated by racial animus. No other motive was even arguably present. In other cases, more than one motivating factor may be present - greed and racial animus, for example. This Court has generally imposed a but-for test of causation in mixed motive cases, requiring proof that the act would not have taken place but-for the illicit motive. E.g., Charles A. Sullivan, Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII, 58 Brooklyn L. Rev. 1107 (1991). See Mt. Healthy Bd. of Education v. Doyle, 429 U.S. 274 (1977).

the Wisconsin statute, the bias-related motive causes the criminal act and, therefore, is an integral part of the criminal act, just as the speech of a blackmailer is an integral part of that crime. Properly understood, Wisconsin's statute does not penalize thought; it merely recognizes that where racial bias demonstrably causes unlawful harm, the bias is an integral part of the criminal act for the purpose of assessing blame, imposing punishment, and achieving deterrence.

C. Since the First Amendment and Principles of Evidence Limit the Proof Admissible to Show That a Crime Was Actually Caused by Racial Bias, the Trial of an Alleged Hate Crime Does Not Constitute an Impermissible Threat to Freedom of Speech.

The Wisconsin court feared that defendant's past speech and association would play an impermissible role in determining whether a crime was bias motivated. The court reasoned that once the issue of bias motivation enters the case as an element of the offense, evidence of prior First Amendment behavior, including speeches, associations, even reading matter, might become admissible at trial to prove the existence of discriminatory motive. The net effect might be to place defendants on trial for their past controversial thoughts.

The concern that trial of alleged bias-motivated crimes may involve improper intrusions into defendant's protected thoughts and associations is a real one. Fortunately, adequate evidentiary safeguards exist.

In this case, the evidence of bias motivation was a statement by the defendant: "You all want to fuck somebody up? There goes a white boy; go get him." 485 N.W.2d at 809. The evidentiary use of such a statement poses no threat to First Amendment values. As a direct incitement to violence, the statement itself was not protected. Brandenburg v. Ohio, 395 U.S. at 446; Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (per Learned Hand). Moreover, the statement is directly related to the incident at issue and was immediately followed by the very lawlessness it incited. See NAACP v. Claiborne Hardware Co., 458 U.S. 886.

Nor should intrusive evidentiary issues arise in other cases. This Court has recognized that the First Amendment itself imposes a significant evidentiary brake on any attempt to use protected speech and association as evidence of crime. Dawson v. Delaware, 112 S. Ct. 1093; Brandenburg v. Ohio, 395 U.S. 444; Scales v. United States, 367 U.S. 203 (1961). See also United States v. Abel, 469 U.S. 45 (1984) (permitting evidence of membership in prison gang to impeach, but not to prove liability); Peter E. Quint, Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg, 86 Yale L.J. 1622 (1977); Rebecca H. White, The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act, 53 Ohio State L.J. 1 (1992). While the First Amendment evidentiary rule is not absolute, it imposes a duty on the trial judge to weigh the probative value of evidence of First Amendment activity against the prejudicial impact on First Amendment values.

Moreover, traditional evidentiary principles codified in Rule 403 of the Federal Rules of Evidence, adopted by Wisconsin, impose significant limits on evidence about a defendant's past beliefs and associations. The Wisconsin statute aims at crimes actually caused by bias. Courts, confronted with the task of trying Title VII and similar cases have distinguished between evidence immediately relevant to defendant's state of mind and efforts to intrude into a defendant's past First Amendment activities. Dawson v. Delaware; Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989) (distinguishing between statements directly related to incident and general speeches), cert. denied, 496 U.S. 937 (1990); Haskell v. Kaman Corporation, 743 F.2d 113 (2d Cir. 1984); United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990). Indeed, evidence of bias that does not relate immediately to the incident at issue is of such minimal probative value that, standing alone, it should not even satisfy the State's production burden. Leary v. United States, 395 U.S. 6 (1969); United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).

Given the First Amendment evidentiary rule, Rule 403, and the need to tailor the evidence to proof of immediate causation, bias-motivation trials should not prove unduly intrusive. In the absence of a serious danger of systematic intrusion, the Wisconsin Court's invocation of the First Amendment overbreadth doctrine to strike down the Wisconsin statute on its face was clearly improper. New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

D. This Court's Decision in R.A.V. v. City of St. Paul Does Not Justify Invalidation of Wisconsin's Decision to Enhance Sentences for Bias-Motivated Crimes.

Strictly speaking, the decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), invalidating a St. Paul hate-speech ordinance has little or nothing to do with this case. The substantive First Amendment issue posed by R.A.V. was whether the psychological harm to victims caused by hate-speech is sufficiently grave and sufficiently certain to justify making hate-speech a crime. Beauharnais v. Illinois, 343 U.S. 250 (1952). This Court found it unnecessary to resolve that issue: five members of the Court found the St. Paul ordinance invalid on its face because it regulated speech on the basis of content, 112 S. Ct. at 2547-50, and four members of the Court found it invalid because it was overbroad. 112 S. Ct. at 2558. Despite the obvious difference between a statute criminalizing speech and a statute penalizing criminal acts, the state court apparently believed that the reasoning of the five person majority in R.A.V. dooms any effort to single out bias-motivated crimes for enhanced penalties. Since, the Wisconsin court reasoned, this Court in R.A.V. barred St. Paul from singling out biased speech for differential regulation, it also barred the state from singling out biased conduct for differential regulation.

But the ban on content-based censorship invoked by the Court's majority in R.A.V., is triggered only when the state seeks to regulate speech. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). Such limits are designed to assure that unpopular speech will not be singled out for

discriminatory censorship. See generally Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975). Accordingly, the majority in R.A.V. held that biased and unbiased speech must be regulated equally.

Where, however, as here, the state regulates conduct, not speech, it may treat biased and unbiased conduct differently as long as a justifiable basis exists for doing so. A justifiable basis clearly exists. See, James Weinstein, First Amendment Challenges to Hate Crime Legislation: Where's the Speech?, Criminal Justice Ethics 6-20 (1992).

Bias-motivated violence spawns hatred, retaliation and social disintegration. Bluntly put, it is a form of social terrorism. Victims of bias-motivated assaults suffer alienation, fear, and anguish that often exceed their visible bodily injuries. Members of the victim's community share the pain, since they must live with the fear that their skin color may make them targets for similar violence. Finally, third-persons are likely to react violently to bias-motivated violence, seeking either revenge or emulation. Thus, the Wisconsin legislature had at least a rational basis for the decision, shared by forty-three other states, to impose enhanced sentences for bias-motivated crimes.

Moreover, Wisconsin's statute satisfies even the strict equality standard applicable to content-based regulation of speech. In R.A.V., the Supreme Court of Minnesota sought to justify its hate-speech ordinance as a device to regulate "fighting words." The majority of this Court reasoned that since fighting words could take the form of both biased and non-biased speech, the only justification for banning biased fighting words while permitting non-biased fighting words was hostility to the biased speaker's message. 112 S. Ct. at

2548. Where, however, as here, a distinction between bias-motivated and non-bias-motivated criminal conduct is justified by a state's legitimate regulatory interests in deterrence and retribution, even the R.A.V. majority would authorize differential treatment. 112 S. Ct. at 2546. See also Leathers v. Medlock, 111 S. Ct. 1438 (1991).

Our growing understanding of the psychological underpinnings of racial prejudice suggests its terrible power as a motivating force. See generally Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 328-339 (1987). Increasing the penalty for crimes motivated by such a potent psychological drive is a classic effort to achieve augmented deterrence - both general and specific. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law (2d ed. 1986).

Nothing in this society's commitment to freedom of speech requires us to ignore the patent difference between vandalism and Kristallnacht. Hate crimes impose unique harms. Wisconsin's attempt to respond to those harms with increased deterrence and augmented denunciation does not violate the First Amendment.

CONCLUSION

THE DECISION OF THE SUPREME COURT OF WISCONSIN SHOULD BE REVERSED.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of the City of New York,
100 Church Street,
New York, NY 10007
(212) 788-1041

BURT NEUBORNE and
NORMAN DORSEN,
of Counsel to the City of New York,
40 Washington Square So.
New York, NY 10012
(212) 998-6172

LEONARD J. KOERNER,*
LAWRENCE S. KAHN,
RONALD P. YOUNKINS,
PAMELA SEIDER DOLGOW,
LINDA H. YOUNG,
of Counsel.
*Counsel of Record

DANNY R. WILLIAMS
Director of Law
601 Lakeside Avenue
Room 106-City Hall
Cleveland, OH 44114
SHARON SOBOL JORDAN
Chief Counsel
RICHARD F. HORVATH
Chief Ass't Dir. of Law of Counsel

MICHAEL V. COLEMAN
City Attorney
68 Mitchell Street, S.W.
Suite 4100
Atlanta, GA 30335
(404) 330-6400

NEAL M. JANEY
City Solicitor
Department of Law
City Hall, Suite 101
100 Holiday Street
Baltimore, MD 21202
(410) 396-3100

ALBERT W. WALLIS
Corporation Counsel of the City of Boston
City Hall
Boston, MA 02201
(617) 635-4609

KELLY R. WELSH
Corporation Counsel Chicago
LAWRENCE ROSENTHAL
Deputy Corporation *Counsel*
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
30 N. La Salle Street
Chicago, IL 60602
(312) 744-7764

JAMES K. HAHN
City Attorney
JULIE P. DOWNEY
Assistant City Attorney
JESSICA F. HEINZ
Deputy City Attorney
1800 City Hall East
200 North Main St.
Los Angeles, CA 90012
(213) 485-4288

JUDITH E. HARRIS
City Solicitor
MICHAEL F. EICHERT
Divisional Deputy, Appeals
City of Philadelphia
Law Department
8th Floor, 1600 Arch St.
Philadelphia, PA 19103
(215) 686-5247

LOUISE H. RENNE
City Attorney
City and County of San Francisco
City Hall, # 206
San Francisco, CA 94102
(415) 554-4216
DENNIS AFTERGUT
of Counsel.